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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ATTILIO ARMENI,

Plaintiff(s),

v.

**AMERICA'S WHOLESALE
LENDER, et al.,**

Defendant(s).

CASE NO. SACV 11-1317 DOC (SHx)

**ORDER GRANTING IN PART
AND DENYING IN PART MOTION
TO DISMISS**

Before the Court is Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") (Dkt. 11). After considering the moving, opposing, and replying papers thereon, and for the reasons stated below, the Court hereby GRANTS IN PART and DENIES IN PART the Motion. The Court also GRANTS Defendants' request for judicial notice.

I. BACKGROUND

Plaintiff Attilio Armeni, in his capacity as Trustee of the Armeni Family Trust dated July 23, 1993, filed this suit against America's Wholesale Lender ("AWL") in its capacity as the originating lender, Deutsche Bank National Trust Company ("Deutsche Bank") in its capacity as

1 purported assignee of Plaintiff's deed of trust, and Bank of America, N.A., as successor by
 2 merger to BAC Home Loan Servicing, LP ("BAC"), in its capacity as purported mortgage
 3 servicer. On April 23, 2006, Plaintiff executed a \$630,000 promissory note, secured by a deed
 4 of trust, to finance real property located in Westlake Village, California. Shortly after the
 5 origination of his loan, AWL sold the loan. (FAC ¶ 21.) Plaintiff alleges that his loan was never
 6 properly assigned and transferred into the HarborView Mortgage Loan Trust 2006-5
 7 ("Harborview Trust"). (*Id.* ¶ 21.) As a result, Plaintiff concludes that the loan was never
 8 properly transferred to Deutsche Bank as Trustee of the Harborview Trust, as required by the
 9 Trust Agreement (aka the Pooling and Services Agreement), thereby preventing Defendants from
 10 collecting on the note and enforcing the loan. (*Id.* ¶¶ 22-25.) Plaintiff believes that because the
 11 copy of the note and deed of trust provided by Defendants does not reflect an endorsement to
 12 Deutsche Bank, it was not properly transferred to Deutsche Bank and Deutsche Bank therefore
 13 has no right to collect on the loan. (*Id.* ¶ 34.)

14 Plaintiff alleges that Defendants attempted to cover up their failure to properly assign or
 15 transfer the mortgage by executing and filing a fraudulent Assignment of Deed of Trust. (*Id.* ¶
 16 27.) Plaintiff believes the Assignment was fraudulent because it was robo signed by a person
 17 who did not have the corporate authority to sign on behalf of MERS. (*Id.* ¶ 28.) Plaintiff does
 18 not dispute that he owes money on the loan, rather, he disputes the amount owed and asks the
 19 Court to determine the true creditor of his note and deed of trust. (*Id.* ¶ 32.)

20 Alternatively, if the Court finds an enforceable security interest in the note or deed of
 21 trust on behalf of any Defendant, Plaintiffs allege that Defendants have breached Section 2 of the
 22 deed of trust, as well as the implied covenant of good faith and fair dealing, by charging
 23 improper fees, miscalculating and misapplying payments to offset principal and interest, and that
 24 Defendants have committed various statutory violations, including the Fair Debt Collections
 25 Practices Act ("FDCPA") and the Real Estate Settlement Procedures Act ("RESPA"). (*Id.* ¶ 2.)

26 **II. LEGAL STANDARD**

27 Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon
 28 which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is

1 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has
 2 “facial plausibility” if the plaintiff pleads facts that “allow[] the court to draw the reasonable
 3 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, --- U.S. ----,
 4 129 S. Ct. 1937, 1949 (2009).

5 In resolving a Rule 12(b)(6) motion under *Twombly*, the Court must follow a two-
 6 pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but
 7 “[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory
 8 statements, do not suffice.” *Id.* Nor must the Court “accept as true a legal conclusion couched
 9 as a factual allegation.” *Id.* at 1949-50 (quoting *Twombly*, 550 U.S. at 555). Second, assuming
 10 the veracity of well-pleaded factual allegations, the Court must “determine whether they
 11 plausibly give rise to an entitlement to relief.” *Id.* at 1950. This determination is context-
 12 specific, requiring the Court to draw on its experience and common sense, but there is no
 13 plausibility “where the well pleaded facts do not permit the court to infer more than the mere
 14 possibility of misconduct.” *Id.*

15 **III. DISCUSSION**

16 **A. Authority to Collect on Loan**

17 Plaintiff’s theory, that Deutsche Bank has no authority to collect on his loan
 18 because the transfer of the loan into the Harborview Trust was not done in compliance with the
 19 terms of the Trust Agreement, does not give rise to legally cognizable claims. Plaintiff admits
 20 that he is not an investor of the Harborview Trust, or a third party beneficiary of the Trust
 21 Agreement, either of which might give him standing to challenge the breach of that agreement
 22 (Opp’n at 11). See *Bascos v. Federal Home Loan Mortg. Corp.*, No. CV 11–3968–JFW (JCx),
 23 2011 WL 3157063, at *6 (C.D. Cal. July 22, 2011) (“To the extent Plaintiff challenges the
 24 securitization of his loan because Freddie Mac failed to comply with the terms of its
 25 securitization agreement, Plaintiff has no standing to challenge the validity of the securitization
 26 of the loan as he is not an investor of the loan trust.”); *In re Correia*, 452 B.R. 319, 324 (1st Cir.

1 BAP 2011) (where debtors asked court to declare mortgage assignment invalid based upon
 2 breach of Pooling Services Agreement, a contract to which debtors were not a party nor third-
 3 party beneficiaries, the court found that debtors lacked standing to object to any breaches of the
 4 terms of the PSA).

5
 6 Because Plaintiff lacks standing to raise alleged breach of the Trust Agreement, to
 7 the extent his claims are based on breach of this agreement, the claims fail and Defendants'
 8 Motion to Dismiss is GRANTED as to these claims.

9 **B. Individual Claims for Relief**

10 **1. Declaratory Relief**

11 A claim for declaratory relief is not a stand-alone claim, but rather depends upon
 12 whether or not Plaintiff states some other substantive basis for liability. *See Glue-Fold, Inc. v.*
 13 *Slautterback Corp.*, 82 Cal. App. 4th 1018, 1023 n.3, 98 Cal. Rptr. 2d 661 (2000) (noting that
 14 equitable forms of remedy "have no separate viability" if plaintiff's other causes of action fail).
 15 Because some of Plaintiff's substantive claims underlying the alleged controversy over who
 16 owns Plaintiff's loan survive Defendants' motion to dismiss, Defendant's motion to dismiss
 17 Plaintiff's claim for declaratory relief is DENIED.

18 **2. FDCPA**

19
 20 Plaintiff alleges that Deutsche Bank violated the Fair Debt Collections Practices
 21 Act, 15 U.S.C., § 1692(e), because it is a debt collector acting under false pretenses to collect
 22 payments on Plaintiffs' loan when they have no legal authority to do so. (FAC ¶¶ 52-54.)
 23 Although not listed under the header of this claim, it appears that Plaintiff brings this claim
 24 against BAC as well, alleging that BAC engaged in illegal collection activities. (*Id.* ¶ 56.)

25
 26 In addition to the reasons stated above, this claim fails because Plaintiff's
 27 allegations do not demonstrate that either Defendant is a debt collector under the terms of the
 28 statute. Under the FDCPA, the definition of a debt collector does not include anyone collecting

1 a debt where the debt was not in default at the time it was obtained by the person trying to
 2 collect. 15 U.S.C. § 1692a(6)(F)(iii). In *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th
 3 Cir. 1985), the Fifth Circuit noted that the “legislative history of section 1692a(6) indicates
 4 conclusively that a debt collector does not include the consumer’s creditors, a mortgage
 5 servicing company, or an assignee of a debt, as long as the debt was not in default at the time it
 6 was assigned.”

7
 8 Plaintiff does not allege that his loan was in default when any Defendant obtained
 9 the right to collect payments on the loan. Instead, Plaintiff merely alleges that Deutsche Bank
 10 and BAC have no such right. Because there are no allegations of pre-collection default, this
 11 claim fails. Yet, at oral argument, Plaintiff’s counsel indicated that the loan was actually in
 12 default. Plaintiff will have one additional chance to plead this cause of action. Accordingly,
 13 Defendants’ Motion to Dismiss this claim is GRANTED but Plaintiff’s FDCPA claim is
 14 DISMISSED WITHOUT PREJUDICE.

15 3. RESPA

16 Plaintiff alleges that he sent BAC a Qualified Written Response (“QWR”) under
 17 RESPA, 12 U.S.C., § 2605, requesting the identity and contact information for the creditor on
 18 the note, a loan history, accumulated late fees, and the validity of the debt purportedly owed to
 19 Deutsche Bank. (FAC ¶¶ 69-71.) In BAC’s response, Plaintiff alleges that BAC did not provide
 20 contact information for the purported owner of the note. (*Id.* ¶ 72.)

21
 22 The Court recently considered a nearly identical QWR in *Maria Lindsay, et al. v.*
 23 *America’s Wholesale Lender, et al.*, SA CV 11-1303-DOC(MLGx). In that case, the Court
 24 concluded that the identical letter sent by plaintiff’s counsel, the same counsel here, was not a
 25 QWR because it did not contain a statement of reasons for the borrower’s belief that the account
 26 is in error. *See Lindsay*, Dkt. No. 26 at 6-7. While the letter references fraudulent practices and
 27 accounting tricks, alluding to the idea that such practices have affected Plaintiff’s loan balance,
 28 nowhere in the letter does Plaintiff provide a statement of reasons for his belief that the account

1 is in error. Accordingly, Defendants' Motion to Dismiss this claim is GRANTED.

2 3 4. UCL

4 Plaintiff alleges that Deutsche Bank and BAC have engaged in unlawful, unfair, and
5 fraudulent business practices, in violation of Cal. Bus. & Prof. Code § 17200, *et seq.* (FAC ¶
6 77.) The Unfair Competition Law ("UCL") provides that "unfair competition . . . include[s] any
7 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading
8 advertising. . . ." Cal. Bus. & Prof. Code § 17200. Because the statute is phrased in the
9 "disjunctive," it is violated when there is an unlawful, unfair, or fraudulent act or practice. *See*
10 *Prata v. Super. Ct.*, 91 Cal. App. 4th 1128, 1137 (2001). Because Plaintiff's UCL claim is based
11 in fraud - particularly with respect to allegations of robo-signing - Plaintiff must plead with
12 particularity the circumstances constituting the fraud. *See Kearns v. Ford Motor Co.*, 567 F.3d
13 1120, 1127 (9th Cir. 2009).

14 Here, Plaintiff's claims are sufficiently particular to survive the motion to dismiss.
15 Plaintiff alleges that "[o]n October 28, 2011, 'T. Sevillano,' purportedly an 'Assistant
16 Secretary,' for MERS executed the purported Corporation Assignment of Deed of Trust. The
17 Assignment alleges that for 'value received' Mortgage Electronic Registration Systems, Inc.
18 ("MERS") granted, assigned, and transferred to Deutsche Bank National Trust Company, as
19 Trustee for the Harborview Mortgage Loan Trust 2006-5, all beneficial interest in the Deed of
20 Trust, together with the 'money due and to become due thereon with the interest, and all rights
21 accrued or to accrue under said Deed of Trust.' Plaintiff alleges that no such transfer ever
22 occurred, and that 'T. Sevillano' lacked the corporate authority to sign on behalf of MERS and
23 was never an 'Assistant Secretary' for MERS. In fact, Plaintiff further alleges that T. Sevillano is
24 an employee of ReconTrust Company, Inc." Amended Complaint, ¶ 28. This allegation plausibly
25 alleges the date of the fraud, the fraudulent act, and the parties involved in the fraud. This is
26 sufficient to meet even the heightened pleading standard for fraud; in fact, it would be almost
27 impossible for Plaintiff to uncover any additional details of the alleged fraud without the benefit
28

1 of discovery. Further, the Court is concerned by the presence of almost identical allegations
2 regarding the same alleged “robo-signer” in a recently filed case by different plaintiffs. *See Chan*
3 *Y Tang, et al. v. Bank of America, N.A., et al.* (SACV 11-2048 DOC (DTBx)). Accordingly,
4 Defendants’ Motion to Dismiss Plaintiff’s UCL claim is DENIED.

5 6 **5. Breach of Contract**

7 Plaintiff’s breach of contract claim is premised on the theory that Deutsche Bank
8 and BAC breached the deed of trust when they misapplied Plaintiff’s payments according to the
9 terms of the deed of trust. (FAC ¶ 107). Plaintiff alleges that this resulted in improper fees and
10 taxes being added to the balance of his loan. (*Id.* ¶ 113.)

11
12 To state a claim for breach of contract under California law, a plaintiff must allege:
13 (1) the existence of a contract; (2) plaintiff’s performance or excuse for nonperformance of the
14 contract; (3) defendant’s breach of contract; and (4) resulting damage. *Durell v. Sharp*
15 *Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010). Plaintiff has sufficiently pleaded each of
16 these elements. Plaintiff’s deed of trust is the alleged contract (FAC ¶¶ 108-09), Plaintiff alleges
17 that he has substantially performed (¶ 112), Plaintiff alleges that Defendants breached Section 2
18 of the deed of trust by misapplying payments (¶¶ 113, 115), and Plaintiff alleges that he has been
19 damaged by overpaying on the deed of trust (¶ 116). Accordingly, Defendants’ motion is
20 DENIED as to this claim.

21 **6. Breach of Implied Covenant**

22 Plaintiff argues that Deutsche Bank and BAC breached the implied covenant of
23 good faith and fair dealing by making it impossible for Plaintiff to carry out his obligations
24 under the deed of trust due to improperly applied payments, resulting in addition of interests and
25 fees, to his account. (FAC ¶ 118.) This allegation contradicts Plaintiff’s earlier allegation (FAC
26 ¶ 112) that Plaintiff substantially performed all of the conditions under the deed of trust,
27 including making monthly payments.
28

1 Ignoring this contradiction for a moment, “the covenant is implied as a supplement
2 to the express contractual covenants, to prevent a contracting party from engaging in conduct
3 which (while not technically transgressing the express covenants) frustrates the other party’s
4 rights to the benefits of the contract.” *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1153
5 (1990). Plaintiff alleges that Defendants’ misapplication of payments frustrated his ability to
6 fulfill his obligations under the loan because Defendants’ practices caused improper fees and
7 interest to be added to the loan. (FAC ¶ 123.) If Plaintiff amends his contradictory allegations
8 regarding performance, the Court finds he may be able to state a claim for breach of the implied
9 covenant. Accordingly, Defendants’ Motion to Dismiss this claim is GRANTED but Plaintiff is
10 granted leave to amend.
11

12 **IV. DISPOSITION**

13 For the reasons set forth above, the Court hereby GRANTS IN PART AND
14 DENIES IN PART Defendants’ Motion to Dismiss. Plaintiff must file any amended complaint
15 by February 13, 2012 but the only claims that are dismissed without prejudice are the claims for
16 breach of implied covenant and breach of FDCPA. Other than that claim, to the extent
17 Defendants’ Motion to Dismiss was granted, it was WITH PREJUDICE.
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20
21 IT IS SO ORDERED.
22 DATED: January 25, 2012

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DAVID O. CARTER
25 United States District Judge
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